No. 95-415

Supreme Court, U.S.
FILED
SEP 26 1995
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ATLANTIC MUTUAL INSURANCE COMPANY, ET AL.,
Petitioners,

v.

COLUMBUS-AMERICA DISCOVERY GROUP,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT W. TRAFFORD
WILLIAM J. KELLY, JR.
JAMES D. CURPHEY
PORTER, WRIGHT, MORRIS & ARTHUR
41 South High Street
Columbus, OH 43215
(614) 227-2000

RICHARD A. CORDRAY
4900 Grove City Road
Grove City, OH 43123
(614) 539-1661

RICHARD T. ROBOL*
JANE E. RINDSBERG
COLUMBUS-AMERICA DISCOVERY GROUP
433 West Sixth Avenue
Columbus, OH 43201
(614) 299-6000

R. HEWITT PATE
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8200

*Counsel of Record

September 1995

WASHBURN FINANCIAL • (804) 236-1081 • RICHMOND, VIRGINIA

28 pp

RESTATEMENT OF QUESTIONS PRESENTED

1. Should this Court exercise its supervisory powers to address contentions never made below that the court of appeals violated the law of the case doctrine when it declined to interpret its prior opinion in the case as having set forth factual findings made in the first instance by the appellate court?

2. Did the district court abuse its broad discretion to fashion a salvage award based on the particular facts of this case?

LIST OF PARTIES

The only party not identified in the list provided in the petition is the Insurance Company of North America, which was a claimant below. Pursuant to Supreme Court Rule 29.1, the Court is advised that respondent has no parent companies or subsidiaries that are not wholly owned.

TABLE OF CONTENTS

PAGE

RESTATEMENT OF QUESTIONS PRESENTED . i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 9

I. THIS CASE PRESENTS NO LAW OF THE CASE ISSUE, MUCH LESS ONE MERITING REVIEW 9

II. THE DISTRICT COURT'S CASE SPECIFIC EXERCISE OF ITS BROAD DISCRETION IN FASHIONING A SALVAGE AWARD DOES NOT MERIT REVIEW 13

CONCLUSION 22

TABLE OF AUTHORITIES

Cases:

Allseas Maritime, S.A. v. M/V Mimosa, 812 F.2d 243 (5th Cir. 1987) 21

Anderson v. Bessemer City, 470 U.S. 564 (1985) 12

Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R., 389 U.S. 327 (1967) 22

Chance v. Certain Artifacts Found and Salvaged, 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302 (11th Cir. 1985) 20

Hill v. BASF Wyandotte Corp., 696 F.2d 287 (4th Cir. 1982) 12

Hobart v. Drogan, 35 U.S. (10 Pet.) 107 (1836) 13

Maine v. Taylor, 477 U.S. 131 (1986) 7, 12

Mason v. Ship Blaireau, 6 U.S. (2 Cranch) 240 (1804) 17

National Capital Naturists, Inc. v. Board of Supervisors of Accomack County, Va., 878 F.2d 128 (4th Cir. 1989) 12

Oelwereke Teutonia v. Erlanger & Galinger, 248 U.S. 521 (1919) 13

Platoro, Ltd. v. Unidentified Remains, 695 F.2d 893 (5th Cir.), *cert. denied*, 464 U.S. 818 (1983) 20

THE BLACKWALL, 77 U.S. (10 Wall.) 1 (1876) . . . 4, 14

THE BOYNE, 98 F. 444 (D. Va. 1899) 20

THE HAXBY, 83 F. 715 (4th Cir. 1897) 20

Miscellaneous:

3A M. Norris, BENEDICT ON ADMIRALTY (7th ed. 1980) 14

G. Gilmore & C. Black, THE LAW OF ADMIRALTY (2d ed. 1975) 18

D. Steel & F. Rose, KENNEDY'S LAW OF SALVAGE (5th ed. 1985) 14

R. Stern & E. Gressman, *et al.*, SUPREME COURT PRACTICE (7th ed. 1993) . . 9

No. 95-415

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ATLANTIC MUTUAL INSURANCE COMPANY, ET AL.,
Petitioners,

v.

COLUMBUS-AMERICA DISCOVERY GROUP,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

An accurate statement of the proceedings below, curing the artful omissions and mischaracterizations in the petition, makes plain that certiorari review is not warranted.

This is the second round of appellate proceedings in this case, which arises from the discovery by Columbus-America Discovery Group ("Columbus-America") of the 1857 shipwreck SS CENTRAL AMERICA. Columbus-America commenced an admiralty action *in rem* in 1987, seeking confirmation of its title to the wreck. Following Columbus-America's recovery of substantial amounts of antique gold from the shipwreck in 1989, numerous

insurance companies, including petitioners here ("Underwriters"), asserted claims that they were owners of the gold by virtue of having allegedly insured it some 130 years earlier. The ensuing litigation has resulted in two opinions each from the United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit, as well as an earlier denial of a petition for certiorari in this Court, No. 92-1189.

The first round of appellate proceedings began in 1990, after the district court awarded Columbus-America the shipwreck and its cargo. The district court had bifurcated the trial, initially addressing the question whether Underwriters had abandoned any claims that they may have had to the antique gold by destroying records or otherwise failing to assert any interest in the sunken vessel and its cargo. In the event Underwriters were found not to have abandoned their claims, the district court would have held further proceedings to determine what amounts, if any, each underwriter had actually insured. After hearing evidence on the first issue, however, the district court was "satisfied that [Columbus-America] ha[d] carried its burden of establishing by clear and convincing evidence that each of the insurance companies [had] long ago abandoned any claim, right, title, or interest *that they may have had* in the gold...." Pet. App. 395a-396a (emphasis added). Accordingly, the district court did not proceed to make any factual findings on each underwriter's ownership claims.

Underwriters appealed, and a divided panel of the United States Court of Appeals for the Fourth Circuit reversed the district court's abandonment holding. Pet. App. 217a-321a. In its opinion, the Fourth Circuit acknowledged the bifurcation of the proceedings below,

and the fact that the second part of those proceedings had never occurred:

> The Court had earlier bifurcated the trial so that the first phase only concerned whether the underwriters had abandoned the gold; should no abandonment be found, a second phase, examining what the underwriters actually insured and setting the proper salvage award, would also be necessary.

Pet. App. 283a; *see also id.* at 242a. The court of appeals also made the following statement:

> The lower court . . . found "*prima facially*" that the underwriters did insure the treasure and that they received ownership interests in the gold once the claims were paid. . . . [W]e find that the district court did not err when it held that the underwriters who are now parties, or their predecessors in interest, paid off claims upon and became the owners of the commercial shipment of gold in 1857.

Pet. App. 265a-266a (emphasis in original).

Ultimately, the court of appeals concluded that the recovered gold had not been abandoned. The court of appeals therefore remanded the case with the following instructions:

> On remand, the district court is to apply the law of salvage, and in so doing it must determine what percentage of the gold each underwriter insured. Equally, if not more, important, the Court must also determine the proper salvage award for Columbus-America. Although this is a

> decision that must be left to the lower court, we are hazarding but little to say that Columbus-America should, and will, receive by far the largest share of the treasure.

Pet. App. 274a-275a. Based on the unusual circumstances, the court of appeals also suggested that "the lower court might want to consider denominating the award as a percentage of the total recovery." Pet. App. 278a. This Court denied Columbus-America's interlocutory petition for certiorari on the abandonment issue on March 22, 1993. Pet. App. 399a.

On remand, the district court conducted a two-week trial in the summer of 1993, in which it considered the testimony of dozens of witnesses, thousands of documents, and hundreds of pages of briefs. The district court applied the following factors laid down by this Court many years ago to guide trial courts in fashioning appropriate salvage awards:

> "(1) The labor expended by the salvors in rendering the salvage service; (2) the promptitude, skill, and energy displayed in rendering the service and saving the property; (3) the value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed; (4) the risk incurred by the salvors in securing the property from the impending peril; (5) the value of the property saved; and (6) the degree of danger from which the property was rescued."

Pet. App. 120a-121a (quoting *THE BLACKWALL*, 77 U.S. (10 Wall.) 1, 8 (1876)). The district court also considered a seventh factor, which had been articulated by the court of appeals because of the circumstances of this salvage

effort — "the degree to which the salvors have worked to protect the historical and archaeological value of the wreck and items salved." Pet. App. 121a. In the end, the district court concluded: "This is not an ordinary salvage case. The time, energy, worry, skill, the property employed, and the efforts to preserve the site and the artifacts have not been equaled in any other case." *Id.* 125a. It therefore granted Columbus-America a ninety percent salvage award. *Id.* 202a.

The district court declined, however, to make factual findings on whether Underwriters had proved any ownership interest in the gold recovered from the shipwreck, pending further instructions from the court of appeals. The district court observed that it had "made no finding at the 1990 trial as to what amount of gold was aboard the CENTRAL AMERICA, what amount was insured or what sums the insurers paid, or the amount of gold found." Pet. App 176a. Ultimately, although the district court took all of the parties' evidence on ownership, the court concluded that it was uncertain whether the mandate from the court of appeals directed it "to determine which underwriters insured the gold aboard the CENTRAL AMERICA and the amounts insured and paid," so it declined to make any such determination. Pet. App. 181a. The court noted, however, that if its rulings were appealed, "the case can be returned for such a finding." *Id.*

On January 13, 1994, the district court issued an interlocutory order directing Columbus-America to prepare a plan for marketing the recovered gold, which is to be presented for consideration to Underwriters and the district court once this case returns to that court. Pet. App. 203a-216a. This order, which is designed to develop a marketing procedure in which all parties will participate in the decisionmaking, also ensures, as observed by the

Fourth Circuit, that "the district court will retain jurisdiction over the marketing of the gold." *See* Pet. App. 67a.

Underwriters again appealed the district court's rulings on several points, including the court's determination of the proper salvage award and its interlocutory order on marketing. This time, the Fourth Circuit unanimously rejected all of Underwriters' claims. On the salvage award, in particular, the court approved the district court's findings and conclusions on the seven pertinent factors in every respect. Pet. App. 52a-64a. Indeed, the court of appeals went out of its way to underscore its emphatic agreement with the propriety of this salvage award for the "extraordinary" work performed by Columbus-America:

> It will not be often, if ever, that all of the principles governing salvage awards will so overwhelmingly militate in the salvor's favor. It will also be rare that a ship and cargo will have been imperiled for so long, and will be so difficult to objectively value, that a flat percentage award will be preferred to a sum certain. *Nevertheless, this is that exceptional case*, and though the district court's ninety percent award is a generous one, we cannot say that it is excessive.

Pet. App. 61a-62a (emphasis added); *see also id.* 72a ("What Thompson and Columbus-America have accomplished is, by any measure, extraordinary. We can say without hesitation that their story is a paradigm of American initiative, ingenuity, and determination."); *id.* 55a ("In short, we cannot imagine anyone demonstrating more diligence, skill, and energy than Columbus-America has shown here. Its efforts provide a standard against which all others should be judged.").

The Fourth Circuit also affirmed the trial court's establishment of unified marketing, to be administered under the continuing supervision of the district court. Although Underwriters sought to have the gold divided *in specie* — a request that was made for the first time only *after* the second trial — the court of appeals recognized that this approach was simply impractical due to the particular circumstances of this case:

> The difficulty in this case, however, is that there is just too much gold involved to allow more than one party to market it. The loss of the gold aboard the CENTRAL AMERICA significantly affected the precious metal and financial markets in 1857, and there is evidence that the gold's recovery could, upon its re-entry into the market, have a significant effect today.

Pet. App. 65a. The court therefore agreed that unified marketing "is necessary," that it is "eminently sensible" to allow "the party with by far the greater interest in the plan's success to coordinate it," and that any objections or concerns raised by Underwriters could be addressed at any time by the district court, which "will retain jurisdiction over the marketing of the gold." *Id.* 66a-67a.

Finally, the Fourth Circuit addressed the current state of the proceedings on Underwriters' alleged ownership interests. Underwriters argued that the court of appeals had "found" in the previous appeal that "they collectively owned the $1.2 million of insured gold that had been reported lost." Pet. App. 69a. The court rejected this argument, noting the "basic tenet of our legal system that, although appellate courts often review facts found by a judge or jury to ensure that they are not clearly erroneous, they do not make such findings in the first instance." *Id.* (citing *Maine v. Taylor*, 477 U.S. 131, 144-45 (1986)). The

court of appeals reviewed its previous opinion and the statements relied upon by Underwriters in support of their view that the court of appeals had earlier made factual "holdings" that established 100% ownership by Underwriters. The court of appeals noted that its statements occurred in the context of discussing "*prima facie*" showings of ownership, and explained that the passage referred only to the district court's "initial finding that [petitioners] had standing to pursue their claims" as the court had undertaken to resolve the abandonment issue. Pet. App. 70a.

The court of appeals noted the further passages in its previous opinion where it had discussed the consequences of the bifurcation of the original trial, which refuted Underwriters' argument that "a *prima facie* showing is all that is required for [them] to prove their claims." Pet. App. 71a. In sum, the court concluded: "We suppose that we might have more clearly expressed ourselves, but it ought to be crystal clear that a claimant cannot prove his or her claim merely by filing a lawsuit." *Id.* "From the time that the underwriters filed their claim on September 29, 1989, the district court has never made findings concerning the amount of gold aboard the CENTRAL AMERICA that each underwriter — or its predecessor-in-interest — had insured and obtained by subrogation upon paying a claim of loss." *Id.* 67a. The court of appeals therefore remanded the case and instructed the district court to proceed to make factual findings on whether Underwriters can prove that they possess valid ownership rights by showing that they (or their predecessors-in-interest) actually insured the gold in 1857 and paid claims on the losses. *Id.* 72a. Underwriters filed for rehearing and made a suggestion for rehearing *in banc*, which the Fourth Circuit denied without comment. *Id.* 404a.

REASONS FOR DENYING THE PETITION

Underwriters put forward two issues for review here. Neither merits certiorari review, for Underwriters are unable to show that the Fourth Circuit's decision departed from any of the Court's precedents or that a *bona fide* conflict exists among the circuits. Instead, Underwriters merely ask this Court to consider and determine case-specific issues of no general importance beyond the particular facts presented here: (1) whether the Fourth Circuit properly understood statements it made in its own prior ruling in this case; and (2) whether the district court, sitting as a court of equity in the exercise of its admiralty jurisdiction, abused its broad discretion to fashion a salvage remedy by making a percentage award and ordering joint marketing to be administered by the court. These issues would not merit review under any circumstances, and they certainly do not merit review at this interlocutory stage of the proceedings. See R. Stern & E. Gressman, *et al.*, SUPREME COURT PRACTICE 195-198 (7th ed. 1993) (discussing numerous opinions of the Court holding that certiorari should not be granted to review interlocutory orders except in "extraordinary cases"). For all of these reasons, the Court should deny the petition.

I. THIS CASE PRESENTS NO LAW OF THE CASE ISSUE, MUCH LESS ONE MERITING REVIEW

Underwriters begin by urging the Court to exercise its supervisory powers to correct the Fourth Circuit's interpretation of certain passages in its previous opinion that had discussed alleged ownership interests, which Underwriters contend poses an issue under the "law of the case" doctrine. This case presents no opportunity to resolve any such issue, however, for several reasons. Most

fundamentally, Underwriters' contention that the Fourth Circuit "reversed" its prior holding begs the crucial question whether any such holding was ever made. The Fourth Circuit clearly stated that it *had not made* any previous ruling on the ownership issue. Instead, the court flatly rejected Underwriters' attempt to seize on a loose phrase from its earlier opinion as having resolved all factual issues regarding ownership.

While the court of appeals graciously acknowledged "that we might have more clearly expressed ourselves," Pet. App. 71a, the court never suggested it was altering any prior holding. The court of appeals went on to determine that Underwriters' claim — that the *court of appeals itself* had made factual findings on the ownership issue in the first instance and had therefore *proscribed* any such factual findings from being made by the district court — was simply a misreading of the court's previous ruling. *See id.* 69a. Thus, no "law of the case" issue is presented here. Indeed, Underwriters never advanced their law of the case argument in the Fourth Circuit, and it was never addressed below. The issue should not be reviewed here for that reason alone.[1]

Moreover, the Fourth Circuit's treatment of the ownership issue is obviously correct. Underwriters claim that the Fourth Circuit held in its first opinion in this case

---

[1] In the Fourth Circuit, taking as their premise that the Fourth Circuit had made factual holdings on ownership, Underwriters argued that it would violate the law of the case doctrine for the district court to conduct further proceedings on the ownership issue. *See, e.g.*, 4th Cir. Reply and Answering Brief of Claimants-Appellants at 36. Underwriters never contended (as they do for the first time here) that the law of the case doctrine compelled the Fourth Circuit judges themselves to adopt Underwriters' strained interpretation of their own opinion.

that they possessed valid ownership rights in the publicly reported commercial gold shipment. Any such "holding" would be dependent upon antecedent factual findings based on evidence that each petitioner (or a proven predecessor-in-interest) had in fact insured portions of the gold shipment and paid losses on the claims. But no such factual findings have ever been made in this case.

The district court has plainly stated that it "made no finding at the 1990 trial as to what amount of gold was aboard the CENTRAL AMERICA, what amount was insured or what sums the insurers paid, or the amount of gold found," *id.* 176a, and it declined to make such a finding in 1993. Thus, Underwriters have never been able to provide a single citation to any such finding by the district court, for there is no such finding. The court of appeals recently confirmed this in the following statement: "From the time that the underwriters filed their claim on September 29, 1989, the district court has never made findings concerning the amount of gold aboard the CENTRAL AMERICA that each underwriter — or its predecessor-in-interest — had insured and obtained by subrogation upon paying a claim of loss." *Id.* 67a.[2]

It may have appeared to Underwriters that the Fourth Circuit misunderstood the status of these proceedings from certain passages of its initial opinion, but in other

---

[2] For this reason, the Fourth Circuit's decision below would in any event fall within an exception to the law of the case doctrine which, as acknowledged by petitioners, applies when a prior ruling is clearly erroneous and works a manifest injustice. *See* Pet. 25. The unjustified elimination of any opportunity for Columbus-America to challenge the factual foundation of petitioners' alleged ownership rights would meet both of these criteria. Allowing Underwriters to claim ownership of the treasure recovered through Columbus-America's hard work and investment without requiring proof of their claims would be unjust in the extreme.

passages the court of appeals recognized that the bifurcation of the original trial had caused the ownership issue not to be addressed at that juncture. *See id.* 71a. In any event, as the court of appeals decisively noted, Underwriters' interpretation of the Fourth Circuit's prior opinion has no plausible foundation, for it is "a basic tenet of our legal system" that appellate courts "do not make [factual] findings in the first instance." *Id.* 69a (citing *Maine v. Taylor*, 477 U.S. 131, 144-45 (1986)); *see also Anderson v. Bessemer City*, 470 U.S. 564 (1985).

A third reason why this issue does not warrant review is that Underwriters never contend that the Fourth Circuit applies a different legal standard under the law of the case doctrine than does this Court or the other lower courts. On the contrary, the Fourth Circuit faithfully applies this doctrine in accordance with the same standards followed by other courts. *See, e.g., National Capital Naturists, Inc. v. Board of Supervisors of Accomack County, Va.*, 878 F.2d 128, 131 (4th Cir. 1989); *Hill v. BASF Wyandotte Corp.*, 696 F.2d 287, 290 (4th Cir. 1982). Thus, the only real question Underwriters raise in this regard is whether the Fourth Circuit erred by failing to apply that doctrine as they wish on the facts of this case. The Fourth Circuit did not err in this respect, as explained above, and in any event, the issue of whether the court misapplied the proper standard is not worthy of review by this Court, particularly in this interlocutory posture.[3]

---

[3] On remand, ownership rights will be determined by the district court. If Underwriters' claims are not established, the issues raised by the petition will, in effect, be moot. Petitioners' complaint that these matters will have to be "retried," Pet. 13, is particularly ironic, for Underwriters are well aware that the district court has already taken evidence on the ownership issue. Pet. App. 181a. On remand, therefore, it is likely that the district court will make factual findings on this point without another full trial on the issue.

II. THE DISTRICT COURT'S CASE SPECIFIC EXERCISE OF ITS BROAD DISCRETION IN FASHIONING A SALVAGE AWARD DOES NOT MERIT REVIEW

The second issue raised by Underwriters also does not merit review here. They claim that the salvage award fashioned by the trial court was improper, apparently because they object to the court's decision — consistent with both the Fourth Circuit's mandate and their own request below — to give a percentage award rather than an exact dollar amount, *see* Pet. 34, 37, and because they are not satisfied with the marketing process established by the court.[4] *See id.* at 38-44.

This issue involves nothing more than a case-specific inquiry into whether the district court abused its discretion on the particular facts of this case. Such issues are even less worthy of review in the context of a salvage award, for the Court has emphasized that the trial court's discretion is extremely broad in fashioning such relief, and that it is against public policy to encourage appeals in these matters of discretion. *See, e.g., Hobart v. Drogan*, 35 U.S. (10 Pet.) 107, 119 (1836) (Story, J.) (salvage awards should not be modified on appeal except in cases of "clear and palpable mistake or gross over-allowance"); *see also Oelwereke*

---

[4] Petitioners' argument that a percentage award is not appropriate is surprising because petitioners themselves *requested* that such an award be given. In fact, petitioners' post-trial brief to the district court states the following: "Underwriters recommend that the court denominate the salvage award or awards in a percentage or percentages of the recovered treasure. The shares of each of the underwriters likewise should be denominated in percentages." Claimants' Post-Trial Mem. on Salvage Award at 62-63. It would thus be inappropriate for petitioners to obtain discretionary review on this point.

Teutonia v. Erlanger & Galinger, 248 U.S. 521, 524 (1919) (same).[5]

In any event, the district court here properly considered and applied the factors that this Court laid down in *THE BLACKWALL*, 77 U.S. (10 Wall.) at 8, as practical criteria to guide trial courts in exercising their broad discretion to fashion appropriate salvage awards. Applying these factors, the district court made — and the Fourth Circuit upheld — the following findings on the facts of this case:

(1) The labor expended by Columbus-America's team of experts was truly unprecedented among salvage cases, consisting of "some 411,295 hours of labor from 1985 through 1992, at a cost for labor of $8,421,733.66," not including further research work going back more than two decades. Pet. App. 125a. The Fourth Circuit noted, by way of contrast to this "monumental" effort, that "[o]ur research has revealed only two other sunken property cases in which it was reported that the salvor's operations lasted longer than a month." *Id.* 53a.

(2) The promptitude, skill, and energy displayed by Columbus-America far surpassed any previous salvage effort, pushing the boundaries of what had been considered possible by assembling "experts in the various fields of science, archaeology, history, maritime, marketing

---

[5] This deferential approach also reflects established principles of general maritime law. "An appellate court is, generally speaking, loath to change a salvage award unless it appears to be based upon incorrect principles, or upon a misapprehension of the facts, or where it is so grossly excessive or inadequate as to be deemed an abuse of discretion." 3A M. Norris, BENEDICT ON ADMIRALTY § 311 (1980). British salvage practice is consistent on this point also. *See* D. Steel & F. Rose, KENNEDY'S LAW OF SALVAGE 457 (5th ed. 1985).

and publicity, to advise and assist in the use, care, and preservation of the shipwreck site." *Id.* 103a. Indeed, the Fourth Circuit simply concluded: "We *cannot imagine* anyone demonstrating more diligence, skill, and energy than Columbus-America has shown here. Its efforts provide a standard against which all others should be judged." *Id.* 55a (emphasis added).

(3) The value of the property employed by Columbus-America, including the remotely operated, undersea robot NEMO, which it invented, exceeds $6 million, and "Columbus-America rented additional equipment and incurred related expenses of millions more." *Id.* 56a. Once again, "no case reports a salvor to have employed property of a comparable value." *Id.* All of this property was also in frequent danger during at-sea operations 180 miles from the shore.

(4) The risk incurred during Columbus-America's maritime operations was substantial, and "the 487 days that it spent at sea multiplied the intrinsic risks accordingly." *Id.* 57a.

(5) The value of the property saved from the shipwreck is immense; "when the salvage is completed and all the treasure is eventually sold, the haul will be one of the largest in history." *Id.* 57a. On this point, however, it is significant that the antique gold is inherently difficult to value, and its actual valuation will necessarily depend on the manner in which it is marketed. "[A] unified plan is necessary to ensure the maximum return from the sale of the gold." *Id.* 66a. "If the gold must eventually be sold at a discount, it is Columbus-America that will suffer no less than ninety percent of the damage." *Id.* 66a-67a. That is why the district court has provided for marketing under its own auspices and control, so as to protect the value of the *res*.

(6) Columbus-America's recovery exemplifies "the ultimate rescue from the ultimate peril." *Id.* 59a. The Fourth Circuit reached this conclusion by recognizing that the shipwreck salvaged in this case was essentially reduced to a "state of oblivion" after it had been lost in the deep ocean for well over a century. *Id.* 58a.

Finally, the courts below also weighed a seventh factor, which was the salvor's efforts to preserve the historical and archaeological value of the shipwreck and its contents. Here the courts determined that Columbus-America had taken "extraordinary care" in this regard, and that "the efforts to preserve the site and the artifacts have not been equaled in any other case." *Id.* 60a, 125a.

From this account, it is clear that the facts of this case are unique and that the composite picture of Columbus-America's salvage efforts unparalleled in maritime practice. The Fourth Circuit plainly took this view, and therefore concluded that the award fashioned in this case was well within the district court's broad discretion:

> It will not be often, if ever, that all of the principles governing salvage awards will so overwhelmingly militate in the salvor's favor. It will also be rare that a ship and cargo will have been imperiled for so long, and will be so difficult to objectively value, that a flat percentage award will be preferred to a sum certain. *Nevertheless, this is that exceptional case*, and though the district court's ninety percent award is a generous one, we cannot say that it is excessive.

Id. 61a-62a (emphasis added).[6]

Underwriters nonetheless ask the Court to grant plenary review to consider the form of this award. They do not question the size of the award; indeed, they acknowledge that it "did not result in a manifest injustice." Pet. 31. Rather, their argument seems to be that the courts below erred by providing a salvage award denominated as a percentage, rather than as a fixed dollar amount.[7] This specific issue is not worthy of review for several reasons.

First, a percentage award was granted here because of the particular facts presented in this case. This salvage effort is unprecedented. The shipwreck is 1½ miles below the surface of the Atlantic Ocean and 180 miles off the Carolina coast. Because of unfavorable weather patterns (including severe hurricanes and tropical storms) and the difficulty of conducting operations on the high seas, the weather window for salvage efforts is limited. Recognizing these facts, the Fourth Circuit advised that "the lower court might want to consider denominating the award as a percentage of the total recovery." *Id.* 278a. The district court followed that sensible advice, and it did not abuse its discretion in doing so. Moreover, that narrow, case-specific determination is not of any general import.

---

[6] This Court has also stressed that salvage awards should "generally [be] quite liberal to encourage volunteer action taken to preserve life and property subject to the perils of the sea." *Mason v. Ship Blaireau*, 6 U.S. (2 Cranch) 240, 264 (1804) (Marshall, C.J.).

[7] The irony of Underwriters' argument is particularly glaring in light of the fact that it was the Underwriters who argued below for an *in specie* percentage division of the antique gold. *See* Pet. App. 14-15.

At first glance, Underwriters appear to make the incorrect suggestion that no prior decision can be found in which a salvage award was expressed in terms of percentages. Pet. 33-38. Upon closer examination, however, their position is more elusive, for they hedge their point much more narrowly by restating that they "have uncovered not a single case where a salvage award was based *on the percentage of the proceeds of a judicial sale which had not occurred before the award*." *Id.* at 38 (emphasis added). This is a significant shift, because all the parties in this case are aware that admiralty courts *often* express salvage awards in terms of a percentage of the value of the *res*. *See, e.g.*, G. Gilmore & C. Black, THE LAW OF ADMIRALTY § 8-10, at 536 (2d ed. 1975) (discussing cases involving percentage awards). Indeed, in the brief Underwriters submitted to the Fourth Circuit in this very case, they discussed the salvage issue in precisely these terms. *See, e.g.,* 4th Cir. Br. of Claimants-Appellants at 37 (discussing practice of denominating salvage awards as a percentage of the recovery).

The only real complaint made by Underwriters, therefore, is that the courts below in this case approved a salvage award expressed in percentage terms *before* the property had been sold. In an ordinary salvage case, of course, the property already has been recovered and can be accurately valued or sold without delay. The difficulty in *this* case — which to date is *unique* to this case — is that it will take many additional years to market the antique gold appropriately.

The special marketing problems presented in this case bear distinct emphasis in this connection. The Fourth Circuit noted that "there is just too much gold involved to allow more than one party to market it," Pet. App. 65a, and "that separate marketing of the gold would be less efficient and inevitably result in a lower total return," *id.*

at 66a n.24. The evidence in this case showed that the marketing of this large amount of gold could have "a significant effect" on "the precious metal and financial markets." *Id.* In other words, the disposition of the antique gold must be managed very carefully under the district court's auspices; if it is sold too quickly, the result could be a severe depression of the prices obtained in the marketplace, with the result that the salvor would end up with nothing to show for its extraordinary efforts. The district court thus determined that it would be necessary to develop a joint marketing plan, and issued an interlocutory order to guide this process. *Id.* 203a-216a.[8]

Underwriters complain that this order effectively vests title to the gold in Columbus-America and deprives them of their supposed ownership rights (which, again, have not yet been determined). Pet. 38-44. This is inaccurate. The court's interlocutory rulings impose safeguards and controls on the marketing and sale of the gold. Columbus-America is appointed as central authority to propose a marketing program, but that program is to be presented to the court *and to Underwriters* for consideration, and both parties are authorized to designate representatives to participate in marketing decisions. Pet. App. 205a-207a. Underwriters' complaints about the putative effects of the district court's interlocutory marketing order are easily refuted simply by examining the safeguards set forth in the district court's order. *See* Pet. App. 203a-216a.

This case thus vindicates the general principle of maritime law that the fashioning of an appropriate salvage award must be left within the broad discretion of the trial

---

[8] It would be premature to address the details of marketing the antique gold at this time, because the district court has not yet considered or adopted a specific marketing plan.

court on the facts of each case. "Each [salvage] case depends so largely on its own particular facts and circumstances that it is difficult to obtain much assistance from adjudicated decisions." *THE BOYNE*, 98 F. 444, 447 (D. Va. 1899); *see also THE HAXBY*, 83 F. 715, 718 (4th Cir. 1897) ("It is hardly safe to make comparisons of cases of this character . . . . The dissimilar facts are generally so marked . . . as to render the decision in one case an unsafe guide in another."). The sensible rulings made by the courts below implicate no broad legal standards that transcend the particular facts of this case. Accordingly, they are not appropriate for certiorari review.

Underwriters contend that the Fourth Circuit's decision in this case conflicts with the Fifth Circuit's decision in *Platoro, Ltd. v. Unidentified Remains*, 695 F.2d 893 (5th Cir.), *cert. denied*, 464 U.S. 818 (1983), and with a district court ruling that was affirmed without comment by the Eleventh Circuit in *Chance v. Certain Artifacts Found and Salvaged*, 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302 (11th Cir. 1985). This contention is unpersuasive. Each case involved situations where the claim was made that a proper disposition of the *res* would be to award title to the salvor outright. In each case, this claim was rejected because it was determined that an award of title to the salvor would be inappropriate on the facts presented. *Platoro*, 695 F.2d at 903-04; *Chance*, 606 F. Supp. at 808. No similar situation is presented in this case; the courts below directed that a marketing plan be developed that the district court will supervise pursuant to its continuing jurisdiction over the *res*.[9]

---

[9]Underwriters below acknowledged that unified marketing of the antique gold is "preferable." *See* 4th Cir. Brief of Claimants-Appellants 46. In light of this fact, their argument that the district court's unified marketing plan constitutes an abuse of discretion is meritless on its face.

In addition, the facts of *Platoro* and *Chance* range very far afield from the facts of this case. In *Platoro*, the Fifth Circuit found the forced sale of the *res* to be inappropriate because of the sovereign interests of the State of Texas, which "has a strong interest in keeping the *res* because of its historical significance to the State." 695 F.2d at 903. In that case, no owner had come forward to claim the property, which had been recovered from a shipwreck; the State of Texas acted as substitute custodian and ultimately was declared the owner of the *res*. *Id.* at 897, 902. The unusual facts of *Platoro* are thus quite different from the facts of this case, and the same considerations are not applicable here.

In *Chance*, the district court actually found that the salvors had failed to prove all the elements necessary to establish a valid salvage claim, and that any salvage claim against the State of Georgia would in any event be barred by the Eleventh Amendment. *See* 606 F. Supp. at 808-09. Once again, these circumstances are vastly different from the situation presented in this case. Rather than posing any conflict with the ruling below, therefore, these decisions merely serve to reinforce the widely understood principle that — as well stated by the court that decided *Platoro* — "no precise formula has been or can be described for calculating salvage awards." *Allseas Maritime, S.A. v. M/V MIMOSA*, 812 F.2d 243, 246 (5th Cir. 1987).

A final reason for denying certiorari on Underwriters' second question is that the issues thus raised are not appropriate for review in the current interlocutory posture of these proceedings. Underwriters' disagreements with the salvage award and the joint marketing proposed by the district court are premised on their underlying claims that each of them possesses some form of ownership rights in the gold in question. Their ownership claims, however,

have not yet been judicially determined, and the court below has now remanded this case to the trial court with directions to make factual findings in this regard. As noted above, the results of the proceedings on remand could therefore entirely eliminate any need for this Court to consider and decide the merits of the issues raised in Underwriters' second question. *See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) (certiorari denied *per curiam* "because the Court of Appeals remanded the case [and thus it was] not yet ripe for review by this Court").

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

ROBERT W. TRAFFORD
WILLIAM J. KELLY, JR.
JAMES D. CURPHEY
PORTER, WRIGHT,
MORRIS & ARTHUR
41 South High Street
Columbus, OH 43215
(614) 227-2000

RICHARD T. ROBOL*
JANE E. RINDSBERG
COLUMBUS-AMERICA
DISCOVERY GROUP
433 West Sixth Avenue
Columbus, OH 43201
(614) 299-6000

RICHARD A. CORDRAY
4900 Grove City Road
Grove City, OH 43123
(614) 539-1661

R. HEWITT PATE
HUNTON & WILLIAMS
Riverfront Plaza,
East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8200

September 1995

*Counsel of Record